

Congress of the United States
Washington, DC 20515

July 7, 2008

The Honorable Stephen L. Johnson
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Administrator Johnson:

We are writing because of our grave concerns over the current status of implementation of the Clean Water Act. Since 1972, the Clean Water Act has achieved remarkable progress in improving the water quality of the nation's rivers, lakes, and streams. New information obtained by our Committees indicates that enforcement of key provisions appears to be faltering.

An effective and robust enforcement regime is central to protecting the nation's waters and fulfilling the goals of the Clean Water Act. We have obtained an internal document from the Environmental Protection Agency (EPA) that indicates that the Supreme Court's decision in *Rapanos v. United States*, combined with guidance to implement the decision issued jointly by EPA and the Army Corps of Engineers, has resulted in significant adverse impacts to the clean water enforcement program. This document was provided to us by the environmental group Greenpeace and appears to be authentic.

This internal document is a March 4, 2008, memorandum from Granta Y. Nakayama, EPA's Assistant Administrator for Enforcement and Compliance Assurance, to Benjamin Grumbles, EPA's Assistant Administrator for Water.¹ In the memorandum, Assistant Administrator Nakayama examines the implications of the *Rapanos* decision, which failed to produce a controlling majority opinion, but, instead, produced three distinct opinions on the appropriate scope of Federal authorities under the Clean Water Act: (1) the Scalia "relatively permanent/flowing waters test, supported by 4 justices; (2) the Kennedy "significant nexus" test; and (3) the Stevens dissenting opinion, supported by the remaining 4 justices, advocating for maintenance of existing EPA and Corps authority over waters, including wetlands.² Assistant Administrator Nakayama also assesses the implementing guidance issued by EPA and the Corps in June 2007.³

¹ U.S. Environmental Protection Agency, Memorandum from Granta Y. Nakayama, EPA's Assistant Administrator for Enforcement and Compliance Assurance, to Benjamin Grumbles, EPA's Assistant Administrator for Water (Mar. 4, 2008).

² 126 S.Ct. 2208 (2006).

³ U.S. Environmental Protection Agency and U.S. Corps of Engineers, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States* (June 5, 2007).

Mr. Nakayama concludes that the decision and the implementing guidance are having a “significant impact on enforcement” and calls for revisions to the guidance in order to “significantly improve the predictability and efficiency” of the enforcement program.⁴

In the memorandum, Mr. Nakayama states: “Data collected from the regions shows that a significant portion of the CWA enforcement docket has been adversely affected.”⁵ He also states: “The *Rapanos* decision and the resulting Guidance have created uncertainty about EPA’s ability to maintain an effective enforcement program with respect to other CWA obligations.”

According to Mr. Nakayama, the *Rapanos* decision and the guidance “negatively affected approximately 500 enforcement cases” in just nine months.⁶ The memorandum indicates that between July 2006 and December 2007, the agency made a conscious decision not to pursue enforcement of as many as 300 Clean Water Act violations because of the jurisdictional uncertainty created by the *Rapanos* decision and the guidance. This represents a sizable proportion of EPA’s approximately 1,000 civil administrative and judicial enforcement cases under sections 311, 402, and 404 of the Clean Water Act undertaken in FY 2007. Mr. Nakayama’s memo also identifies “147 instances where the priority of an enforcement case was lowered” due to the *Rapanos* decision and the guidance and 61 enforcement cases in which the *Rapanos* decision and guidance provided an affirmative defense to polluters.⁷

This sudden reduction in enforcement activity will undermine the implementation of the Clean Water Act and adversely affect EPA’s responsibility to protect the nation’s waters. Yet instead of sounding the alarm about the EPA’s enforcement problems, the agency’s public statements have minimized the impact of the *Rapanos* decision. On April 16, 2008, when Assistant Administrator Grumbles testified before the Committee on Transportation and Infrastructure about the implementation of the Clean Water Act after *Rapanos*, Mr. Grumbles failed to inform the Committee that approximately 500 enforcement cases had been negatively affected.⁸ Mr. Grumbles also did not inform the Committee that the head of EPA’s Office of Enforcement and Compliance Assurance recently told him that *Rapanos* and the guidance had created uncertainty about EPA’s ability to maintain an effective enforcement program. Instead, he said that *Rapanos* and the guidance had “generated the important benefit of greater

⁴ U.S. Environmental Protection Agency, Memorandum from Granta Y. Nakayama, EPA’s Assistant Administrator for Enforcement and Compliance Assurance, to Benjamin Grumbles, EPA’s Assistant Administrator for Water (Mar. 4, 2008).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ Testimony of Benjamin H. Grumbles, Assistant Administrator, U.S. EPA, before the House Committee on Transportation and Infrastructure (Apr. 16, 2008).

coordination among” EPA’s clean water programs, including the Office of Enforcement and Compliance Assurance.⁹

Our Committees are investigating these enforcement problems. To assist our Committees’ investigation into this matter, we request that you provide our Committees with complete and unredacted copies of (a) communications between EPA regional offices and EPA headquarters relating to the data collected and referenced in the March 4, 2008, memorandum from Assistant Administrator Nakayama to Assistant Administrator Grumbles; (b) communications within each EPA regional office relating to the March 4, 2008, memorandum; and (c) all other communications related to the March 4, 2008, memorandum from Assistant Administrator Nakayama to Assistant Administrator Grumbles. Please provide the communications referenced in (a) and (b) by July 14, 2008, and the communications referenced in (c) by July 21, 2008.

We also request that you answer the following questions and provide the following information by July 21, 2008:

1. The guidance states that it relates only to those provisions at issue in *Rapanos* and does not address or affect other subparts of the EPA and Corps of Engineers regulations or response authorities. Nevertheless, EPA data indicate that EPA regional offices have applied the guidance when identifying violations for both the National Pollutant Discharge Elimination System (NPDES) permit program (section 402) and Oil Spill (section 311) enforcement programs.
 - a. Does the guidance apply in cases other than interpreting Clean Water Act jurisdiction for discharges subject to permitting under section 404? What are EPA’s policies (formal or otherwise) regarding the impact of the *Rapanos* decision and the guidance on jurisdiction under sections 402 and 311 of the Clean Water Act? Is this policy consistent with actions taken by EPA regional offices?
 - b. Do the EPA regional offices use the guidance in making jurisdictional determinations under sections 402 and 311? If so, under what authority or direction are EPA regional offices applying the guidance to the section 402 and 311 programs?

If not, please reconcile that position with the table provided by Associate Administrator Christopher Bliley in his correspondence to Chairman Oberstar dated March 21, 2008, titled “Effects of *Rapanos* on EPA’s Civil Enforcement Program, Summary of Regional Responses, Covering Period of July 2006 through

⁹ *Id.*

December 2007.” Also, please provide a similar, updated table for the period January 2008 through June 20, 2008.

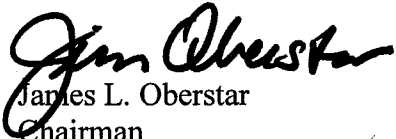
2. Please provide all guidance and documents from each EPA region regarding each region’s policies regarding the relationship between the *Rapanos* decision and guidance and establishing jurisdiction under sections 311, 402, and 404 of the Clean Water Act, including for enforcement actions for violations of the Act.
3. Assistant Administrator Nakayama referred to “uncertainty about EPA’s ability to maintain an effective enforcement program” and stated that a “significant portion of the CWA enforcement docket has been adversely impacted.” What entity or office, or what individual or position, at each EPA regional office and at EPA headquarters is responsible for decisions to either pursue or not pursue formal and informal enforcement actions for suspected Clean Water Act violations in light of the uncertainty about EPA’s jurisdiction identified by your Assistant Administrator? Is this the same entity, office, individual, or position that determines whether to “lower the priority” of an enforcement action based on the uncertainty about EPA’s jurisdiction?
4. When EPA makes jurisdictional determinations for enforcement actions regarding violations of sections 311, 402, and 404, are such determinations made with an implied presumption of jurisdiction or non-jurisdiction for intermittent and ephemeral tributaries to traditionally navigable waters and headwater streams, including associated wetlands for such waters?
 - a. If there is an implied presumption of non-jurisdiction, what is the policy justification for this presumption, and what is the legal basis for making such a presumption? Please provide all documents that include EPA and other executive agency deliberations regarding this policy or practice.
 - b. If there is an implied presumption of non-jurisdiction, please explain how this presumption is consistent with the stated goal of the Clean Water Act “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”
 - c. If there is an implied presumption of non-jurisdiction, please clarify EPA’s statement to Chairman Oberstar, dated May 15, 2008, that “...EPA and the 45 states authorized to issue NPDES permits, *as a standard practice*, do not question CWA jurisdiction when a discharger applies for a permit....” [Emphasis added].
5. To what extent has EPA’s Criminal Enforcement Program regarding Clean Water Act violations been impacted by the *Rapanos* decision and the guidance? Please provide all documents involving these impacts.


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The Committee on Transportation and Infrastructure has jurisdiction over the Clean Water Act and its implementation. The Committee on Oversight and Government Reform is the principal oversight committee in the House of Representatives and has broad oversight jurisdiction as set forth in House Rule X. An attachment to this letter provides additional information about how to respond to the Committees' request.

If you have any questions concerning this request, your staff may contact Ryan C. Seiger of the Committee on Transportation and Infrastructure at (202) 225-0060 or Greg Dotson of the Committee on Oversight and Government Reform at (202) 225-4407.

Sincerely,


James L. Oberstar
Chairman
Committee on Transportation
and Infrastructure


Henry A. Waxman
Chairman
Committee on Oversight
and Government Reform

Enclosures

cc: John L. Mica
Ranking Minority Member
Committee on Transportation
and Infrastructure

Tom Davis
Ranking Minority Member
Committee on Oversight
and Government Reform



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAR 4 2008

ASSISTANT ADMINISTRATOR
FOR ENFORCEMENT AND
COMPLIANCE ASSURANCE

- SUBJECT TO DELIBERATIVE PROCESS PRIVILEGE -

MEMORANDUM

SUBJECT: OECA's Comments on the June 6, 2007 Memo, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States*

FROM: Granta Y. Nakayama
Assistant Administrator

TO: Benjamin Grumbles
Assistant Administrator for Water

Thank you for the opportunity to provide comments on the June 6, 2007 memo, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States* ("the Guidance"). OECA's comments reflect our experience over the last seven months in implementing the Guidance. The Guidance was issued to apply solely to the wetlands program (Section 404) under the Clean Water Act (CWA); nonetheless, EPA Regions have applied the guidance when identifying violations for both the NPDES (Section 402) and Oil Spill (Section 311) enforcement programs, and our comments therefore reflect those experiences as well.

OECA collected and compiled data from the regions describing the CWA enforcement program impacts of the *Rapanos* decision and the Guidance. We have included a summary of those findings to illustrate the importance of these issues to OECA. We have also identified specific areas of the Guidance that have impeded our efforts to pursue enforcement, and where clarifications and modifications to the Guidance can significantly improve the predictability and efficiency of our CWA compliance determinations and enforcement efforts to ensure that our nation's water quality is protected.

Post-Rapanos Impacts on Enforcement

Data collected from the regions shows that a significant portion of the CWA enforcement docket has been adversely affected. While we are not able to distinguish whether these impacts are due primarily to the *Rapanos* decision or to the Guidance, this information revealed that from July 2006 to the present, the regions decided not to pursue formal enforcement in 304 separate instances where there were potential CWA violations because of jurisdictional uncertainty. In addition, the regions identified 147 instances where the priority¹ of an enforcement case was lowered due to jurisdictional concerns. Finally, the regions indicated that lack of CWA jurisdiction has been asserted as an affirmative defense in 61 enforcement cases since July 2006. Thus, since July 2006, the *Rapanos* decision or the Guidance negatively affected approximately 500 enforcement cases. When compared to EPA's annual enforcement results for FY2007 where EPA resolved a total of approximately 1,000 civil administrative and judicial enforcement cases under CWA sections 311, 402 and 404, it is clear that there has been a significant impact on enforcement. Attached to this memo is a copy of the table that shows the volume of Federal enforcement activities affected by the *Rapanos* decision.

Since the *Rapanos* decision and the issuance of the Guidance, my staff has been assisting the regions in collecting evidence to support violation determinations where CWA jurisdiction is at issue. The largest burden in these efforts stems from the implied presumption of non-jurisdiction for the most common types of waters in our country, intermittent and ephemeral tributaries to traditionally navigable waters and headwater wetlands. This presumptive exclusion can only be overcome by a resource-intensive "significant nexus analysis" as described in the Guidance. Performing these analyses has had a detrimental impact on CWA 404 enforcement efforts by significantly increasing resources expended on gathering jurisdictional evidence, reducing the predictability of these evaluations, and increasing the time it takes to complete the determination. For example, in order to demonstrate jurisdiction in small administrative cases, regions are spending thousands of dollars to model flow and conduct extensive field investigations.

The *Rapanos* decision and the resulting Guidance have created uncertainty about EPA's ability to maintain an effective enforcement program with respect to other CWA obligations. For instance, it is unclear whether NPDES and Oil Pollution Act (OPA) programs should use the Guidance when collecting evidence for enforcement cases, or, because footnote 17 restricts the application of the Guidance to section 404, whether EPA's evaluation of jurisdiction is governed by some other standard, such as the *Rapanos* decision itself. This creates uncertainty for EPA and the regulated community as to whether there has been a violation of the Act. Such uncertainty results in delays in enforcement and increases the resources needed to bring enforcement cases under these programs.

¹ "Lowering of a priority" means changing from a formal to an informal enforcement response, reducing the amount of the civil penalty, or significantly delaying the initiation of a case.

Impediments to Determining Violations Under the Guidance

The Guidance's procedure for establishing jurisdiction for not-relatively permanent (intermittent and ephemeral) tributaries and their adjacent wetlands has created the most significant challenge to maintaining an effective and efficient enforcement program. This challenge is significant because these types of waters are the most prevalent types of water bodies found in the United States. One estimate² of the extent of intermittent and ephemeral tributaries in the United States found that 95% of the stream channels and 75% of the total stream channel length are composed of first and second order streams;³ in arid areas, this percentage is even higher. Region 9 estimates that 95% of Arizona's streams and rivers are intermittent and ephemeral and that 97% of the state's NPDES permits are located on intermittent and ephemeral streams.⁴ These intermittent and ephemeral waters are vital to the protection of our Nation's streams and rivers and are where many compliance determinations and enforcement actions arise.

The most significant challenge affecting CWA enforcement is found in Section 3 of the Guidance. The Guidance redefines the word tributary by restricting the definition of a tributary to a single stream segment of the same stream order. This has come to be known as the concept of "relevant reach." In applying the Guidance to evaluate whether a tributary has a significant nexus to a traditionally navigable water, EPA is limited to the geographic extent of the "relevant reach" of that tributary. The concept of relevant reach is not found in the technical literature, the dictionary definition of a tributary, or in the *Rapanos* decision. Applying the concept of relevant reach as the unit of measure for a significant nexus evaluation of smaller tributaries (including intermittent and ephemeral tributaries) isolates the small tributary and ignores the nexus of the tributary system as a whole to the traditionally navigable water. The concept of relevant reach also ignores longstanding scientific ecosystem and watershed protection principles critical to meeting the goals of the CWA. A more traditional and scientifically accepted ecological concept, which is not precluded by the *Rapanos* decision, recognizes the vital role tributary systems play in maintaining the biological, physical and chemical integrity of waters of the United States, including traditionally navigable waters.⁵ The relevant reach concept artificially isolates each element of a watershed into numerous individual and seemingly independent tributaries.

² Fritz, K.M., B.R. Johnson, D.M. Walters, and J.E. Flotemersch, *Assessing Headwater Streams: Linking Landscapes to Stream Networks*. Presented at Science Forum 2004, Washington, DC, June 10-3, 2004.

³ First and second order streams are roughly equivalent to ephemeral and intermittent streams in arid areas and are collectively referred to as head water streams.

⁴ U.S. EPA Region 9. 2003. Comment letter on the Advanced Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States."

⁵ Alexander, Richard B., Elizabeth W. Boyer, Richard A. Smith, Gregory E. Schwarz, and Richard B. Moore, 2007. The Role of Headwater Streams in Downstream Water Quality. *Journal of the American Water Resources Association (JAWRA)* 43(1):41-59. DOI: 10.1111/j.1752-1688.2007.00005.x

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Recommendations Consistent with the *Rapanos* Decision

A few targeted revisions to the Interagency Guidance would address these issues, while remaining consistent with the *Rapanos* decision. These recommendations would significantly improve the efficiency of compliance determinations, reduce the extraordinary resource burden on the enforcement program, and result in a more predictable and efficient enforcement program for the regulated public and industries.

The Definition of a Tributary

We recommend modifying the definition of a tributary to eliminate the relevant stream reach concept embodied in the second sentence of Footnote 21 and on Page 9. Instead, we recommend that the definition simply include what is found in the first sentence of Footnote 21: "A tributary is a natural, man-altered, or man made water body that carries flow directly or indirectly into a traditionally navigable water." This will result in a more commonly recognized definition of tributary that is more consistent with the way tributaries are defined, for example, in the fields of hydrology and geography. The term "relevant reach" is not found in the *Rapanos* decision, and by removing it from the guidance, the guidance will be more consistent with the tributary discussions found in the *Rapanos* decision. Moreover, our recommendation will also remove the single most restrictive element of the Guidance that is adversely affecting CWA enforcement.

Significant Nexus for Wetlands Adjacent to "Not Relatively Permanent" Tributaries

We recommend revising the Guidance to incorporate Justice Kennedy's suggestion that, when evaluating jurisdiction, it is appropriate to consider wetlands either alone or in combination with other "similarly situated lands in the region." (*Rapanos*, 126 S.Ct. 2208, 2249 (2006)). This increases the certainty and predictability of jurisdictional determinations by considering the collective effects from all wetlands in the same region when evaluating significant nexus. Moreover, this approach would create resource efficiencies because, as Justice Kennedy articulates in his statements on administrative convenience (*Rapanos*, 126 S.Ct. at 2249), the initial exercise of demonstrating significant nexus for a similar group of wetlands could be applied to the next enforcement case on comparable wetlands in the same region. The Guidance should include a framework for an acceptable regional analysis for a significant nexus evaluation, for example, by incorporating watershed boundaries such as those defined by the Hydrologic Unit Code that are currently used in the implementation of Section 303(d) of the CWA and the development of TMDLs.

Significant Nexus for Not Relatively Permanent Tributaries

We recommend revising the Guidance's approach for determining whether tributary streams, without associated wetlands, are subject to CWA jurisdiction. Justice Kennedy's opinion in the *Rapanos* decision leaves sufficient room for developing a separate, more workable standard for determining whether EPA has authority to regulate streams without associated wetlands. For these types of waters, Justice Kennedy stated

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that "[an ordinary high-water mark] may well provide a reasonable measure of whether specific minor tributaries bear a sufficient nexus with other regulated waters to constitute "navigable waters" under the Act." (*Rapanos*, 126 S.Ct. at 2249). OECA recommends that the Guidance include a discussion of using the ordinary high water mark, combined with other factual data on flow, chemistry or biology, to provide a valid and efficient measure of sufficient nexus to other regulated waters for these types of tributaries. The measured use of the ordinary high water mark would be simple to apply in the field, reduce resources expended, and provide more predictability for the regulated public. By making this revision, the Guidance would recognize the traditional and accepted ecological concepts of the vital role tributary systems play in maintaining the chemical, physical and biological integrity of waters of the United States, including traditionally navigable waters.

Scope of the Guidance Beyond Section 404

To the extent that the Guidance is not applicable to enforcement under sections 311 and 402 of the CWA, we recommend that the Office of Water provide additional clarification on how to establish jurisdiction for these programs, either by: (1) indicating that jurisdictional determinations in CWA cases (other than 404) are not restricted by the Guidance and that the existing regulations should be applied to jurisdictional determinations to the extent they were not affected by the *Rapanos* decision; or (2) providing clear guidance as to how jurisdiction should be determined in cases involving CWA section 402 and 311.

Conclusion

We appreciate the Office of Water's efforts to provide guidance in the wake of the questions raised by the *Rapanos* decision and hope that our comments, based on field experience in applying the Guidance, can inform appropriate revisions to the Guidance. It is very important that the regulated community and the regulators have clear and predictable standards and approaches by which to determine and understand Clean Water Act jurisdiction, as well as to ensure the American public that the goals of the Clean Water Act are being met. Please feel free to call me or have your staff call Mark Pollins at 202-564-4001, if you would like to discuss these comments further.

cc:

Roger Martella
Craig Hooks
Jim Hanlon
Ephraim King
Denise Keehner
Steve Neugeboren
David Evans
Linda Boornaizian

- SUBJECT TO DELIBERATIVE PROCESS PRIVILEGE -

**Effects of Rapanos on EPA's Civil Enforcement Program
Summary of Regional Responses
Covering Period of July 2006 through December 2007**

Region	1. Instances where an enforcement action was considered to be appropriate based on existing violations, but where the Region chose not to pursue formal enforcement based on the uncertainty about EPA's jurisdiction over the receiving waters.	2. Cases where an enforcement action was considered to be appropriate based on existing violations, but where the Region chose to "lower the priority" of the case based on the uncertainty about EPA's jurisdiction over the receiving waters.	3. Any case where lack of CWA jurisdiction has been asserted by the alleged discharger as an affirmative defense to an enforcement action.
1	1 (404)	1 (OPA); 2 (402)	1 (404); 1 (402)
2	0	1 (402)	1 (402/404)
3	4 (402/404)	6 (402)	4 (402/404)
4	13 (OPA); 8 (402)	19 (404); 6 (402)	14 (404)
5	3 (404)	14 (404); 15 (402)	6 (404); 1 (402)
6	86 (OPA); 52 (402/404)	4 (402/404)	3 (OPA); 2 (402/404)
7	3 (OPA); 10 (402); 4 (404)	5 (OPA); 3 (404); 19 (402)	2 (OPA); 1 (404); 3 (402)
8	106 (OPA); 3 (402/404)	8 (OPA); 9 (402/404)	2 (OPA); 2 (402/404)
9	11 (404)	4 (OPA); 4 (404); 11 (402); 2 (402/404)	4 (404); 5 (402); 1 (402/404)
10	1 (402)	1 (OPA); 4 (404); 9 (402)	5 (404); 5 (402)
TOTALS *	305	147	63

* The total number of cases affected by Rapanos may be less than the total number of all cases in the three categories; a single case may have met the criteria of more than one category.